

**United States Department of Labor
Employees' Compensation Appeals Board**

N.U., Appellant

and

**U.S. POSTAL SERVICE, LA PUENTE POST
OFFICE, La Puente, CA, Employer**

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Docket No. 20-1022

Issued: January 25, 2022

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

PATRICIA H. FITZGERALD, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 13, 2020 appellant, through counsel, filed a timely appeal from a March 6, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the September 30, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether appellant has met his burden of proof to establish that the acceptance of his claim should be expanded to include an additional right shoulder condition as causally related to the accepted employment injury.

FACTUAL HISTORY

On January 19, 1999 appellant, then a 43-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on January 14, 1999 he sustained right arm repetitive stress syndrome as a result of lifting a tray of flats on his route.⁴ OWCP accepted the claim for right elbow strain, right biceps tendinitis, and right lateral epicondylitis. On January 18, 2000 appellant underwent OWCP-authorized exploration of the rotator cuff of the right shoulder, coracoacromial release, and acromioplasty of the right shoulder. He returned to work in a full-time modified city letter carrier position on September 1, 2000. By decision dated January 16, 2002, OWCP granted appellant a schedule award for 13 percent permanent impairment of his right arm. In a July 15, 2002 decision, it reduced his wage-earning capacity to zero as his actual earnings as a modified city letter carrier, effective September 1, 2000, fairly and reasonably represented his wage-earning capacity. By decision dated October 24, 2017, an OWCP hearing representative affirmed the July 15, 2002 decision.

In medical reports dated September 29 and November 3, 2015 and April 12, 2016, Dr. Charles Herring, Jr., an attending Board-certified orthopedic surgeon, diagnosed, among other things, right shoulder acromioclavicular (AC) joint arthrosis, right shoulder impingement syndrome with subacromial bursitis, and status post right shoulder rotator cuff repair in 1999. He noted that appellant's right shoulder rotator cuff repair was related to his accepted employment injury. Dr. Herring also noted that appellant's AC joint arthrosis was caused by his work duties, which involved lifting and sorting mail from hampers to tubs for delivery. He requested that the acceptance of appellant's claim should be expanded to include right rotator cuff tear and sought authorization for right shoulder arthroscopy.

On April 27, 2016 OWCP referred appellant, along with a statement of accepted facts (SOAF), the medical record, and a list of questions, to Dr. Steven M. Ma, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of the employment injury and disability.

In a June 1, 2016 report, Dr. Ma noted that he had reviewed the SOAF and appellant's medical record. He diagnosed right shoulder impingement syndrome, which had resolved by his January 18, 2000 surgery. Dr. Ma opined that the diagnosed condition was causally related to

⁴ OWCP assigned the present claim OWCP File No. xxxxxx890. Appellant subsequently filed an occupational disease claim (Form CA-2) on March 18, 2013 alleging that he sustained neck and left shoulder surgeries resulting from his repetitive federal work duties. OWCP assigned that claim OWCP File No. xxxxxx924 and accepted it for left rotator cuff tear, cervical strain, permanent aggravation of cervical degenerative disc disease, multilevel intervertebral disc syndrome, and cervical radiculopathy. Appellant underwent OWCP-authorized left shoulder arthroscopy on July 28, 2014 and cervical spine surgery on March 30, 2018. He stopped work at the employing establishment on July 28, 2014. OWCP administratively combined OWCP File Nos. xxxxxx890 and xxxxxx924, with the former serving as the master file.

appellant's accepted employment injury. He further opined that there was no objective evidence of a right rotator cuff tear and that further surgery was not medically necessary.

On August 16, 2017 OWCP referred appellant for an impartial medical examination with Dr. Thomas Saucedo, a Board-certified orthopedic surgeon, selected as the impartial medical examiner (IME) to resolve the conflict in medical opinion as to whether there was causal relationship between appellant's diagnosed right shoulder condition and the accepted work-related injury.

In a September 27, 2017 report, Dr. Saucedo reviewed appellant's history of injury, medical records, and the SOAF. He provided a review of systems and noted a history of hypertension. On physical examination of the right shoulder he found evidence of tenderness in the coracoacromial ligament area. There was mild swelling, a positive impingement sign, and weakness in all planes of motion 4/5. Abduction and forward flexion were from 0 to 110 degrees, internal rotation was to 90 degrees, and external rotation was to 60 degrees. Appellant was neurologically intact distally. Dr. Saucedo reported that x-rays of the right shoulder revealed evidence of mild-to-moderate AC joint arthrosis. He diagnosed status post right shoulder rotator cuff repair and chronic right shoulder impingement syndrome. Dr. Saucedo noted that appellant underwent right shoulder surgery on January 18, 2000. He related that the surgery was a diagnostic examination and exploration of the rotator cuff with evidence of a rotator cuff tear which required a repair at that time. Dr. Saucedo indicated that appellant subsequently presented with episodes and flare ups of pain and discomfort of the right shoulder and a magnetic resonance imaging (MRI) scan arthrogram was repeated on March 25, 2011. The right shoulder MRI scan arthrogram revealed evidence of surgical intervention and no evidence of a labral tear. In light of these findings, appellant continued to complain of shoulder pain and discomfort with limitation of function as a result of his injuries and job requirements and repetitive use of his extremity, and he underwent a third MRI scan arthrogram with contrast of the right shoulder on August 19, 2015. The right shoulder MRI scan revealed evidence of a partial undersurface tear versus postoperative changes to the supraspinatus tendon, no retracted cuff, a superior labral tear was suggested with evidence of osteoarthritis changes of the AC joint. Dr. Saucedo advised that given these findings and his examination findings, there was no doubt that appellant had a significant loss of range of motion (ROM) of the shoulder and loss of strength as a result of the chronic nature of the impingement of his right shoulder; however, there was no radiographic evidence to substantiate the need for a right shoulder rotator cuff repair. He noted that if his symptoms persisted, then he would require further medical treatment. Dr. Saucedo agreed with Dr. Ma's opinion that there was no clinical evidence to substantiate a right rotator cuff tear and need for surgery related to appellant's original injury. He advised, however, that there were findings indicative of an impingement of the right shoulder relating to the initial injury. Dr. Saucedo indicated that appellant's symptoms and condition had not resolved.

By decision dated September 5, 2019, OWCP denied expansion of the acceptance of appellant's claim to include right shoulder rotator cuff tear and authorization for the requested rotator cuff repair. It found that the opinion of Dr. Saucedo, as the IME, constituted the special weight of the evidence.

In a letter of even date, OWCP expanded the acceptance of appellant's claim to include right shoulder chronic impingement syndrome, right shoulder strain, right calcium deposit in the tendon and eursa (biceps tenosynovitis/tendinitis), and right lateral epicondylitis.

On September 18, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP received medical reports, including additional reports dated August 27 and November 19, 2019 by Dr. Herring who noted that appellant had a right shoulder partial-thickness rotator cuff tear as demonstrated by a 2015 MRI scan.

In a March 6, 2020 decision, an OWCP hearing representative affirmed the September 5, 2019 decision.

LEGAL PRECEDENT

When an employee claims that, a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁵

To establish causal relationship, the employee must submit rationalized medical opinion evidence.⁶ The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the accepted employment injury.⁷ The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.⁸

Section 8123(a) of FECA provides, in pertinent part, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician (known as a referee physician or IME) who shall make an examination.⁹ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an IME, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹⁰

⁵ *D.T.*, Docket No. 20-0234 (issued January 8, 2021); *see T.E.*, Docket No. 18-1595 (issued March 13, 2019); *T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁶ *D.T.*, *id.*; *T.K.*, Docket No. 18-1239 (issued May 29, 2019); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

⁷ *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *T.K.*, *id.*; *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁸ *Id.*

⁹ 5 U.S.C. § 8123(a).

¹⁰ *D.B.*, Docket No. 19-0663 (issued August 27, 2020).

ANALYSIS

The Board finds that appellant has not met his burden of proof to establish that acceptance of his claim should be expanded to include an additional right shoulder condition as causally related to the accepted employment injury.

Dr. Herring, in his September 29 and November 3, 2015 and April 12, 2016 reports, diagnosed a right shoulder rotator cuff tear, which he opined was due to the accepted employment injury. OWCP referred appellant to Dr. Ma for a second opinion evaluation to determine the nature and extent of the employment injury. It specifically requested that he provide all diagnosed conditions, which were medically connected to appellant's employment. In his June 1, 2016 report, Dr. Ma opined that appellant had work-related right shoulder impingement syndrome that had resolved by appellant's January 18, 2000 surgery. He further opined, however, that there was no objective evidence of a right rotator cuff tear and that further surgery was not medically warranted. Thus, OWCP properly determined that a conflict in medical opinion existed between Dr. Herring and Dr. Ma as to whether appellant had a right shoulder rotator cuff tear causally related to the accepted employment injury and referred appellant to Dr. Saucedo for an impartial medical examination to resolve the conflict in medical evidence, pursuant to 5 U.S.C. § 8123(a).

In a September 27, 2017 report, Dr. Saucedo reviewed appellant's history of injury, medical records, and the SOAF. Additionally, he described findings on physical and x-ray examinations. Dr. Saucedo agreed with Dr. Ma's opinion that appellant did not have a right shoulder rotator cuff tear that required a rotator cuff repair causally related to the accepted employment injury. He explained that there was no clinical evidence to establish the claimed right shoulder condition and need for surgery. Dr. Saucedo specifically noted that MRI scan arthrograms performed on March 25, 2011 and August 19, 2015 revealed no evidence of a rotator cuff tear or labral tear.

Dr. Saucedo provided an accurate history of the accepted employment injury and reviewed appellant's medical records, noting that the March 25, 2011 and August 19, 2015 right shoulder MRI scan arthrograms did not reveal a rotator cuff tear. He also performed a thorough clinical examination, indicated a review of systems, and noted a history of hypertension. Dr. Saucedo's physical examination revealed right shoulder symptoms and loss of ROM, and his x-ray examination demonstrated evidence of mild-to-moderate AC joint arthrosis. Thus, based on lack of objective findings, he found that appellant did not have an employment-related right shoulder rotator cuff tear that required a rotator cuff repair. The Board finds that Dr. Saucedo provided a well-rationalized opinion based on a complete factual background, a review of the medical record and examination findings.¹¹ Dr. Saucedo's opinion that appellant had no additional right shoulder condition that required medical treatment causally related to the accepted employment injury is entitled to special weight of the medical evidence.¹²

Following Dr. Saucedo's evaluation, appellant submitted additional reports from Dr. Herring in which he noted that appellant had a right shoulder partial-thickness rotator cuff tear

¹¹ See *R.M.*, Docket No. 20-0452 (issued March 4, 2021); *D.G.*, Docket No. 19-1259 (issued January 29, 2020); see also *D.T.*, Docket No. 10-2258 (issued August 1, 2011); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹² See *R.M.*, *id.*; *D.S.*, Docket No. 19-1698 (issued June 18, 2020).

as demonstrated by a 2015 MRI scan. However, Dr. Herring's reports is insufficient to establish the claim as he did not specifically address whether appellant's employment activities had caused or aggravated a diagnosed right shoulder condition.¹³ Additionally, he was on one side of the conflict resolved by Dr. Saucedo. The Board has held that reports from a physician who was on one side of a medical conflict are generally insufficient to overcome the special weight accorded to the IME, or to create a new conflict.¹⁴ Dr. Herring's reports are thus insufficient to overcome the special weight accorded to Dr. Saucedo's opinion or to create a new conflict in medical opinion.¹⁵

As appellant has not submitted rationalized medical evidence establishing causal relationship between his diagnosed right shoulder rotator cuff tear and the accepted employment injury, he has not met his burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish that acceptance of his claim should be expanded to include an additional right shoulder as causally related to the accepted employment injury.

¹³ See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁴ See *W.C.*, Docket No. 19-1740 (issued June 4, 2020); *S.S.*, Docket No. 17-1361 (issued January 8, 2018); *Jaja K. Asaramo*, *supra* note 5; *Michael Hughes*, 52 ECAB 387 (2001).

¹⁵ See *W.C.*, *id.*; *S.S.*, *id.*; *K.R.*, Docket No. 16-0542 (issued December 21, 2016).

ORDER

IT IS HEREBY ORDERED THAT the March 6, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 25, 2022
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board